NO. 22260

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD WALTER BURTON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
DENNIS E. KINNAIRD,
Assistant U. S. Attorney,

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

FILED
MAR 14 1968
WM. B. LUCK, CLERK

NO. 22260

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD WALTER BURTON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
DENNIS E. KINNAIRD,
Assistant U. S. Attorney,

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

TABLE OF AUTHORITIES

NO. 22260

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD WALTER BURTON,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

The Federal Grand Jury for the Central District of California returned Indictment No. 379-(WF)-CD, on March 8, 1967, charging appellant with violation of the Universal Military Training and Service Act, Title 50 App., Section 462, United States Code. On May 16, 1967, the appellant was tried by the court and the case was continued to May 25, 1967. On May 25, 1967, the appellant was found guilty. On June 22, 1967 appellant was sentenced to three years in the custody of the Attorney General, pursuant to Title 18, United States Code, Section 4208(a)(2).

The District Court had jurisdiction to try the case under Title 18, United States Code, Section 3231. This Court has jurisdiction to entertain this appeal pursuant to the provisions of Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES INVOLVED

Title 50 App., Section 462, United States Code, provides in part:

> "Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this this title . . . or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who otherwise evades or refuses . . . service in the armed forces or any of the requirements of this title . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . or rules, regulations or directions made pursuant to this title . . . shall, upon conviction in any District Court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both. . . ."

Title 50 App., Section 456(j) states:

> "(j) Conscientious objectors. -- Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. . . . Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in Section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purpose of Section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title."

III

STATEMENT OF FACTS

The following factual information is abstracted from the appellant's Selective Service File, a photostatic copy of which was received into evidence as Plaintiff's Exhibit No. 1, and from the oral testimony presented at trial. This file, Plaintiff's Exhibit No. 1, is pencil paginated at the bottom of each sheet and is hereinafter referred to by sheet number.

On November 12, 1964, the appellant registered with Local Board No. 117 (hereinafter referred to as "The Board") [p. 1].

On January 14, 1965, appellant was classified II-S. Appellant made no request for a SSS Form 150 (Conscientious Objector's Form) [pp. 7, 11]. On October 21, 1965, The Board received a SSS Form 150 from appellant [pp. 18-23]. The Board reclassified appellant as I-A and so notified him. However, on April 7, 1965, appellant appeared before The Board and a hearing was held concerning appellant's request for a I-O classification [pp. 30-31]. Subsequent to this hearing The Board classified appellant as I-O [p. 11]. Appellant was duly notified of his I-O classification on April 7, 1966.

On May 5, 1966, appellant appeared for a physical examination. On May 12, 1966, appellant was notified that he was acceptable for induction into the Armed Services, or for civilian work in lieu thereof [p. 40].

On May 6, 1966, appellant notified The Board that it was

his intention to serve his required civilian work assignment as an animal keeper for the Los Angeles City Zoo [p. 41].

On May 31, 1966, appellant returned SSS Form 152, "Special Report for Class I-O Registrants", omitting to fill out the portion of the form entitled "Work Qualifications". On this form appellant did apply for his employment as an animal keeper to be approved as satisfying his civilian work assignment [pp. 43, 44]. In addition, appellant submitted a letter stating that he had not checked the list of approved work. Appellant also reiterated his position that he desired to fulfill his obligation by continuing as an animal keeper for the Los Angeles City Zoo [p. 45].

On June 13, 1966, The Board sent a letter to appellant informing him of three employment opportunities which were available and approved. The appellant was requested to designate his preference for the employment specified. Appellant responded to this letter by stating that he did not wish to perform any of the employment offered by The Board [p. 51]. Appellant explained his position by contending that his present employment as an animal keeper in the zoo was the greatest benefit he could perform for the general public [p. 52].

On August 3, 1966, pursuant to the request of The Board, appellant met with Major Miller and The Board for a discussion concerning the type or work available for appellant to satisfy his obligation. At this meeting appellant read the State Director's List of Approved Civilian Work Assignments and claimed that none were acceptable [pp. 59-60]. The Board explained that it was refusing to

accept appellant's request to perform his civilian work assignment at the Los Angeles City Zoo for the reason that it was not on the approved list provided by the State Director [p. 59].

Appellant was ordered to report to the Los Angeles County Department of Charities at 10:00 A. M. on October 5, 1966, for work as an institutional helper [p. 67]. On October 7, appellant informed The Board that he had refused to report for work as ordered by The Board [p. 69]. The Board was also notified by the Personnel Officer, Los Angeles County General Hospital that appellant refused any and all assignments [p. 70].

On March 8, 1967, an indictment was returned by the Grand Jury charging appellant with refusing to perform his civilian work assignment.

At the trial of this case appellant admitted that he had refused to accept any of the offered civilian work assignments, and specifically the work assignment at the Los Angeles County Department of Charities [R. T 26-27]. 1/ Appellant endeavored to show that his work as a primate keeper at the Los Angeles City Zoo was important and was in the public interest. This fact was not contested by appellee in the trial.

1/ R. T. refers to Reporter's Transcript.

IV

QUESTION: SPECIFICATION OF ERROR

Was the order to report for civilian work invalid because it constitutes an abdication by the Local Board of its duly designated function?

ARGUMENT

THE ORDER TO REPORT FOR CIVILIAN WORK WHICH THE APPELLANT DISOBEYED WAS A VALID ORDER AND THE CONVICTION SHOULD BE AFFIRMED.

The specific question now before this Court is that the appellant while appearing to be willing and able to perform civilian work has refused to perform any of the civilian work assignments specified on the State Director's list of approved jobs. The appellant recognizes that employment as a primate keeper is not on the State Director's list of approved jobs and this is the only work that appellant has expressed a willingness to perform. The specific question raised by appellant was recently decided in Mang v. United States, 339 F.2d 369 (9th Cir. 1964). In that case Mang had taken employment with a Quaker social service organization, known as the Friends Committee on Legislation. This work was not approved by the Local Board and Mang was ordered to report to the Los Angeles County Department of Charities. He refused to so report and his indictment followed shortly thereafter. The contention

presented to the court in Mang, ibid., was identical to the issue now before this Court; i.e., the Local Board relied on the State Director's list of approved organizations, and appellant charges this constitutes an abdication of the Local Board's duties; an illegal usurpation of authority by the State Director; and a denial of due process. The court specifically held, ". . . We find no merit in appellant's position." Id. at 370.

In the Mang case, ibid., the court placed reliance on United States v. Lawson, 337 F.2d 800 (3rd Cir. 1964). In that case Mr. Lawson refused to accept any employment that was on the approved list prepared by the State Director. Lawson contended that his employment at Goodwill Industries satisfied his obligation. Id. at 805. The Board notified Mr. Lawson that Goodwill Industries was not approved by the State Director for New Jersey, although it was approved in other States. Id. at 806. In that case, Lawson raised precisely the same objection as raised by appellant herein, in that he contended an abdication by the Local Board of its statutory function by utilizing the State Director's list for the selection of proposed employment for a conscientious objector. As the court there stated, ". . . It becomes apparent that the Board, by permitting itself to be guided in the selection of the proposed employer of this conscientious objector, abandoned none of its autonomy with which the Selective Service Act vested it. Indeed, it is difficult to understand how uniformity of treatment of all conscientious objectors with regard to engagement in public welfare work could otherwise be practiced." Id. at 816.

Appellant endeavors to distinguish Mang, supra, and Lawson, supra, on the grounds that in the instant case appellant did present evidence that established the fact that employment as a primate keeper was in the public interest. As the court in both Mang, supra, and Lawson, supra, recognized, it was immaterial that the work chosen was in the public interest, the crucial factor was that it was not on the State Director's list of approved places of employment. The court found that the local board had not abdicated any of its vested autonomy in being guided by the State Director's list of approved places of employment. It can hardly be doubted that employment with Goodwill Industries was in the public interest, but yet it was not acceptable in New Jersey, and therefore Lawson could not satisfy his obligation by working for the Goodwill Industries. Id. at 806. The crucial point overlooked by appellant is that The Board can rely on the State Director's List of Approved Employment.

Appellant's argument is defective because of the emphasis placed upon classification cases to support the proposition submitted in the present case. The question of classification is particularly local in nature, because classification is an individual subject best determined by the local board that has direct dealings with a registrant. Once a registrant is classified the situation is altogether different. While the regulations do provide for the local board to play an important role in determining as I-O civilian work assignment, the final approval for the order to perform civilian work is placed in the hands of the National Director of Selective Service.

Title 32, Code of Fed. Reg., Section 1660.20(d). The National Director has delegated to the State Director the authority to prepare lists of approved institutions and agencies for civilian work assignments.

In the present case The Board relied upon the State Director's list in rejecting appellant's request to perform his civilian employment obligation as a primate keeper for the Los Angeles City Zoo. [2/] In both Mang, supra, and Lawson, supra, the local boards rejected the registrant's request for the identical reason. Appellant was well aware of the fact that his job as a primate keeper was not on the list of approved employment [R. T. 23-24]. There does not exist any meaningful allegation, argument or fact that distinguishes the present case from the aforementioned precedents supporting The Board's ruling on appellant's case.

[2/] In this respect it may be noted that appellant was earning approximately $500 per month as an animal keeper [R. T. 19], whereas, as an institutional helper the pay was approximately $240 per month [p. 51]. For this reason, among others, the regulations indicate an intent that an individual performing civilian employment in lieu of military service not be allowed to satisfy his obligation by continuing in his regular civilian employment. 32 Code Fed. Reg. Section 1660.21(a).

CONCLUSION

For the reasons cited in the case of Mang v. United States, 339 F. 2d 369 (9th Cir. 1964), and the reasons above mentioned in argument, appellee respectfully submits that the conviction should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

DENNIS E. KINNAIRD,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Dennis E. Kinnaird
DENNIS E. KINNAIRD